United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1165

To be argued by
EDWARD R. KORMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1165

UNITED STATES OF AMERICA,
Appellee,

—against—

JOHN GALANTE and THEODORE CAMERIERO,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

John Galante and Frank Ranzie[1] appeal from judgments of the United States District Court for the Eastern District of New York (Judd, *J.*) entered April 8, 1976, and April 9, 1976, respectively, convicting appellants, after a jury trial, of knowing receipt and possession of a quantity of camera lenses which had been stolen while travelling in foreign commerce (Count Two) and of conspiracy to commit the offense (Count One). Title 18, United States Code, Sections 659, 2 and 371. Appellant Ranzie was sentenced to concurrent four year prison terms on each of the two counts of the indictment. Ranzie

[1] Appellant Ranzie was indicted under the name Cameriero and was referred to throughout the trial under the latter name. He will be referred to by his true name in this brief.

is presently in custody serving an unrelated sentence imposed by the State of New York. Appellant Galante was sentenced to five years imprisonment on Count One, with eligibility for parole after one year, pursuant to Title 18, United States Code, Section 4208(a)(2). On Count Two, Galante received a suspended sentence with a two year probationary term to follow his release from custody. The sentence has been stayed pending the determination of this appeal.

Both appellants urge reversal of their convictions on the grounds that the trial court erred in denying defense motions to suppress as evidence certain stolen camera lenses and other items which were recovered by the Federal Bureau of Investigation from the premises of a store in Brooklyn, New York on April 11, 1975. In addition, appellant Galante argues that it was an abuse of discretion for Judge Judd to admit, as evidence of a prior similar act, his 1973 conviction for unlawful possession of goods stolen from an interstate shipment.

Statement of the Case

A. The Case-in-Chief

During the night of March 22, 1975, a burglary occurred at the Greenpoint Terminal Warehouse in Brooklyn, New York. (T. 37-39).[2] Taken in the burglary were quantities of electronic calculators, radios, and camera lenses valued at approximately $90,000. The camera lenses were bonded, having been shipped from

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[2] References preceded by the letter "T" are to the trial transcript (dates of trial). References preceded by the letter "S" are to the transcript of the suppression hearing held on November 7, 1975.

Japan by Nippon Kogaku, Tokyo and had not as yet been picked up by the consignee, Nippon Kogaku, U.S.A.

One Menachem Cohen, the owner of a store dealing in children's wear and cosmetics known as Bristol Bargain Fair, located at Pitkin Avenue in Brooklyn, New York, testified that sometime towards the very end of March, 1975, an individual whom Cohen only knew as "John" appeared at Bristol Bargain Fair with appellant Galante and introduced Galante to Cohen. At Galante's request Cohen agreed, for a fee, to store some boxes for Galante. (T. 68). Within a day or two, Galante returned to the store with appellant Ranzie and a "few hundred" boxes containing camera lenses and radios. These boxes were put into the basement by Cohen and Galante. After the boxes had been stored, Galante nailed a panel over the basement's entrance to conceal and bar access to the storage area. (T. 69-71).

Galante then told Cohen that the lenses and radios had come out of a customs warehouse. Cohen replied that he wanted the boxes removed. (T. 72). In the meantime, Cohen acted to sell some of the goods for Galante. On the same date Cohen removed a "sample" from one of the boxes and gave it to a friend named Moshe Cohen. Moshe Cohen told Menachem Cohen that he could arrange to sell some of the items. On April 4, 1975, twenty boxes were removed from the basement at Bristol Bargain Fair and transported by Moshe Cohen and Menachem Cohen to Manhattan to be sold. However, upon their arrival in Manhattan on April 4, 1975, with the stolen goods, the two Cohens were arrested by agents of the United States Customs Service. Menachem Cohen was released the same day. (T. 73-76).

Following his arrest Menachem Cohen told Galante that he wanted the remaining camera lenses and radios

removed from the basement of the store. Galante failed to promptly respond, however. Consequently, when on April 9, 1975 Federal Bureau of Investigation agents searched the store, pursuant to a warrant, they found the stolen camera lenses and radios stored by Galante and Ranzie. The agents, however, did not remove the cartons from the store. (T. 80).

On April 10, 1975, Galante came to Bristol Bargain Fair to speak with Cohen. Unaware that Cohen was now cooperating, Galante told Cohen that the boxes would be removed shortly. (T. 81). On April 11, 1975 Galante called Cohen and said he was sending someone to the store to pick up the cameras and lenses. Appellant Ranzie arrived at the store that same afternoon and told Cohen that a truck for the boxes was parked nearby. Not knowing that he was under Federal Bureau of Investigation surveillance, Ranzie drove his truck to the service entrance of the store and proceeded to assist Cohen in loading the stolen goods onto the vehicle.

Before the loading was completed, however, the surveilling agents converged on the truck and arrested Ranzie and also "apprehended" Cohen.[3] Upon his arrest Ranzie gave a false name to the Federal Bureau of Investigation, saying that his name was Theodore Cameriero. Menachem Cohen testified at trial that Ranzie

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[3] Menachem Cohen was named in the same indictment in which appellants were charged. Prior to trial he pleaded guilty to the first count, and his case was severed. On February 20, 1976 Cohen was given a two year suspended sentence and two and one-half years probation, a special condition of probation being that Cohen spend his nights for a period of 30 days in a community treatment center. Cohen was also fined $2,500.

told him he had lied to the agents about his identity when he was arrested. (Tr. 83-85). Appellant Galante was arrested on August 25, 1975.

Also testifying for the Government were Federal Bureau of Investigation Agents Charles Boling, Patrick Colgan and Thomas Armstrong. Through Agent Boling, the boxes containing calculators, radios and camera lenses found in Bristol Bargain Fair on April 9, 1975, and seized on April 11, 1975, were placed in evidence. (T. 174-77). The return on the search warrant was introduced into evidence showing that 1343 calculators, 767 radios and 554 Nikkon lenses were found at Bristol Bargain Fair on April 9, 1975. (See Exhibit D of appellant's appendix). These goods were identified as being part of the bonded shipment stolen on March 22, 1975. Boling also testified that after his arrest Ranzie told the Federal Bureau of Investigation that he had been hired by Cohen to remove the boxes. The hiring, according to Ranzie, had taken place on April 10, 1975, when Ranzie stopped at Bristol Bargain Fair for deodorant and baby powder. (T. 180-81). Agent Boling also stated that upon his arrest Ranzie gave his name as "Theodore Cameriero" and his date of birth as April 2, 1950. (T. 181-82).

Agent Colgan testified that he had met Menachem Cohen on April 9, 1975. (T. 208). On April 10, 1975, Colgan was inside Bristol Bargain Fair when Cohen received a telephone call from Galante in which Galante said that he would be coming to the store that afternoon. (T. 210). On April 11, Cohen called Colgan and told him that Galante had called again and had stated that someone would be sent to remove the merchandise that afternoon. Colgan also testified that he observed Ranzie assisting Cohen in the loading of the boxes into the truck on the afternoon of April 11, 1975. (T. 212-13).

Agent Thomas Armstrong testified that he observed Galante entering Bristol Bargain Fair on the afternoon of April 10, 1975, and then saw Galante exit the store approximately ten minutes later and drive away. (T. 255-57). Through Agent Armstrong, photographs of Ranzie assisting Cohen on the afternoon of April 11, 1975, were admitted into evidence. (T. 259-60). In one of the photographs, Ranzie was seen apparently running to move his truck into a parking space that was opening up near the service entrance to Cohen's store.

Upon completion of Agent Armstrong's testimony, Judge Judd admitted evidence that, on a prior occasion (on or about September 1, 1972), appellant Galante was found in possession of a quantity of sweaters and headphones stolen from an interstate shipment, in violation of Title 18, United States Code, Section 659. The similar act was proved by receiving in evidence a copy of Galante's judgment of conviction dated June 22, 1973.

The final witness was the real Theodore Cameriero. He testified that he had known the defendant Ranzie (as "Frank") for approximately three years and that during 1973 Ranzie had taken his (Cameriero's) wallet containing various identification cards. Cameriero stated that his date of birth was September 2, 1950. Ranzie stipulated that his true birthdate was November 23, 1943. (T. 310-11, 281).

Galante and Ranzie each rested their case without calling any witnesses.

B. The Suppression Hearing

Prior to trial, appellants moved to suppress as evidence the lenses, calculators and radios seized at Menachem Cohen's store on the ground that the affidavit for

the search warrant presented to Magistrate Schiffman did not establish legally sufficient probable cause.

On November 7, 1975, Judge Judd ruled that the affidavit had established legally sufficient probable cause. (S. 18). A hearing was then held to determine the validity of the search on the additional ground that Cohen's consent had been obtained prior to execution of the search warrant.[4]

Testimony at the hearing, which was held on November 7, 1975, established the following facts:

On April 9, 1975, just five days after Cohen's arrest and acting on a tip from an informant, Federal Bureau of Investigation agents went to Bristol Bargain Fair and sought Cohen's consent to a search of the premises. Cohen called his attorney and put Agent Boling on the phone. The attorney stated that he would not allow "his client" to consent to the search. While some agents left to get a warrant, others remained at the store to secure the premises. (S. 23-24, 36).

Subsequently, when the agents returned with the warrant, the search was commenced. While the agents were searching Bristol Bargain Fair, Cohen, who had not yet been questioned, asked Agent Colgan to accompany him to a neighboring store which he also managed. At the second store Cohen told Agent Colgan that he wished

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[4] Although the defendants failed to establish that the search violated *their* rights, Judge Judd held that "[defendants] have standing to make the motion [to suppress] but don't have standing to claim . . . the invalidity of Mr. Cohen's consent." (T. 74). On appeal the United States renews its argument that Galante and Ranzie both lack standing to contest the search of Cohen's store.

to cooperate and would show the agents where the goods they were looking for were located. Cohen pointed out to Colgan that the goods were so well hidden that the agents might not find them. Cohen thereupon proceeded to Bristol Bargain Fair with Colgan, removed the panel nailed up by appellant Galante and showed the agents where the goods were located. (S. 51-52).[5]

The defendant's did not testify at the suppression hearing.

ARGUMENT

POINT I

The District Court properly held that the evidence seized pursuant to the warrant should not be suppressed.

Appellants argue that the search and seizure at Menachem Cohen's store was illegal because the affidavit for a search warrant submitted to the United States Magistrate failed to state probable cause. Citing the recent case of *United States* v. *Karathanos*, 531 F.2d 26 (2d Cir.), certiorari denied, — U.S. —, 96 S. Ct. 3221 (1976), appellants argue that "the affidavit gave no factual basis for the informers [sic] conclusion that the camera lenses that he saw on April 7, 1975, were the ones stolen from the Greenpoint Terminal Warehouse." Appellants made the same argument before Judge Judd, who found under *United States* v. *Ventresca*, 380 U.S. 102 (1965), that a "common sense" reading of the affidavit demonstrated sufficient probable cause. While we believe

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[5] Cohen had not, as of this time, been placed under arrest and the subject of his arrest was not discussed with him until after the goods were discovered. (S. 64, 73).

that Judge Judd was correct, we do not press the issue in light of the holding in *United States* v. *Karathanos*, *supra*.

We submit, however, that it is not necessary for the issue of the validity of the search warrant to be reached here because the appellants have no standing to challenge the admissibility of the evidence.[6] Since the appellants were not in the store at the time of the search and since they did not have any proprietary interest in the store or the goods that were seized, their standing to object to the validity of the search of the basement is necessarily based on the automatic standing rule, which was enunciated in *Jones* v. *United States*, 362 U.S. 257 (1960), and which affords automatic standing where the defendant is charged with a possessory offense and the possession alleged in the indictment occurred at the same time as the search. See *Brown* v. *United States*, 411 U.S. 223, 229 (1973); *United States* v. *Tortorello*, 533 F.2d 801 (2d Cir. 1976). But, as Judge Oakes observed in *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1205, n. 4 [(C.A. 2 (1973)], *cert. denied*, 415 U.S. 984 (1974), that doctrine "has been questioned" in *Brown* v. *United States*, 411 U.S. 223 (1973) and is of "dubious valadity." What remains of the rationale of *Jones*, after *Simmons* v. *United States*, 390 U.S. 377, 390 (1968), is summarized in the following excerpt from the opinion in *Jones* (362 U.S. at pp. 263-264):

> "Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on

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[6] The claim of the appellant Galante (Br. p. 11), that the Government did not question his standing in the district court is incorrect. We filed a memorandum of law on October 31, 1975 contesting his standing.

> the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government."

We submit that this reasoning is plainly erroneous and should no longer be followed. The prosecution here is not subjecting the defendants to "the penalties meted out to one in lawless possession while refusing [them] the remedies designed for one in that situation." The Fourth Amendment, as far as we know, does not confer any "remedies" on one who is in the "situation" of being a lawless possessor of property. See e.g., *United States* v. *Sacco*, 436 F.2d 780, 784 (2d Cir.), *cert. denied*, 404 U.S. 834 (1971). What the prosecution is saying is that the defendants are lawless possessors, that as such they lack standing to complain about a seizure of property which did not otherwise invade their privacy, and that they should be punished because of their lawless possession. The position of the United States is perfectly consistent. See, generally, Trager, *The Law of Standing Under the Fourth Amendment*, 40 Brooklyn Law Rev. 421 (1975).

Moreover, even assuming the continued validity of the automatic standing rule, it affords the appellants standing only to contest the admissibility of the evidence as to the possession count. Since possession is not an essential element of conspiracy to possess stolen goods, the appellants would have no standing to contest the admissibility of the evidence as to the conspiracy count. See, e.g. *United States* v. *Price*, 447 F.2d 23 (2d Cir.), *cert. denied*, 404 U.S. 912 (1971); *United States* v.

Sacco, 436 F.2d 780 (2d Cir.), *cert. denied*, 404 U.S. 834 (1971). Accordingly, at the most, they would be entitled to a reversal of the conviction on the possession count. Indeed, since the appellant Cameriero received concurrent sentences on the conspiracy and possession counts, it is not even necessary to reach the issue of the validity of the search as to him. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16 (1973).

POINT II

Evidence of appellant Galante's prior criminal act was properly admitted.

Appellant Galante argues that Judge Judd erred in admitting the record of his 1973 conviction for unlawful possession of goods stolen from interstate shipment. Galante argues that the prior conviction, being "unrelated" to the crime on trial, "in no way assists, the jury in genuinely resolving the issues posed by the indictment." (Brief of Appellant Galante, p. 19). He further contends that the Assistant United States Attorney gave undue emphasis to the prior conviction in his summation. Galante's claims are without merit. Rule 404(b) of the Federal Rules of Evidence provides:[7]

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person

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[7] A copy of Galante's 1973 judgment of conviction was admitted pursuant to Rule 803(22) of the Federal Rules of Evidence, which provides:

> Evidence of a final judgment entered after a trial or upon a plea of guilty . . . adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year [is admissible] to prove any fact essential to sustain the judgment . . . .

> in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b) merely codifies the longstanding rule that evidence of other crimes is admissible if it is offered for any purpose other than to merely show the criminal character of the defendant. *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967); *United States* v. *Papadakis*, 510 F.2d 286, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Johnson*, 525 F.2d 999, 1006 (2d Cir. 1975). It is not required under Rule 404(b) or the cases that the similar act or crime involve a transaction or sequence of events directly related to the matter on trial. See e.g. *Spencer* v. *State of Texas*, 385 U.S. 560 (1967); *United States* v. *Gannon*, 244 F.2d 541 (2d Cir. 1957); *United States* v. *Rosenblum*, 339 F.2d 473 (2d Cir. 1964); *United States* v. *Egenberg*, 441 F.2d 441 (2d Cir. 1971). *United States* v. *Gerry*, 515 F.2d 130, 140-41 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Viruet*, No. 76-1059 Slip. op. at 5149 (2d Cir., August 5, 1976). "[T]he weighing of the probative value of the evidence against its potentially prejudicial effect is primarily for the trial judge who has a feel for the effect of the introduction of this type of evidence that an appellate court, working from a written record, simply cannot obtain." *United States* v. *Leonard*, 524 F.2d 1076, 1092 (C.A. 2, 1975), *certiorari denied*, — U.S. —, 96 S. Ct. 1737 (1976).

Here, Judge Judd was correct in determining that the probative value of evidence of Galante's prior crime outweighed its prejudicial effect. In this case it was necessary to establish that Galante knew the boxes in Cohen's

store were stolen. In addition, it was the testimony of Agent Armstrong that Galante visited Bristol Bargain Fair for approximately 10 minutes on April 10, 1975. The jury thus had both Cohen's and Agent Armstrong's testimony that Galante entered a store containing goods stolen nineteen days before from a foreign shipment. Galante's 1973 conviction was properly admitted to assist the jury in determining Galante's motive and intent in his April 10 visit to Cohen's store and his knowledge or lack thereof concerning the character of the camera lenses and radios in the basement.

Moreover, at the time he admitted the certified copy of the conviction in evidence Judge Judd ordered that all references to the sentence previously imposed on Galante be removed from the document, and he fully instructed the jury as to how it was to use the "other crimes" evidence (T. 275):

> I have received [it] only in connection with the bearing that it may have on his knowledge or intent or motive in connection with the transaction as testified to by Mr. Cohen, and to his presence in the store as testified to by Mr. Armstrong to the extent that you may believe those. And if you find that it does not have any bearings on his motive or intention, you will just disregard it. But as I have said, the Government can have it read to you.
>
> I think it is proper to say that this is an entirely separate matter.
>
> A date almost two years earlier. So it does not bear on the guilt or innocence of this particular defendant.

Again during the charge to the jury, Judge Judd stated (T. 434):

> As I said at the beginning when it came in, it is not brought in to show that he is a bad man.

> It was brought in for such weight as you may want to attribute to it with reference to his knowledge as to whether the goods were stolen—his motive for being on the premises on April 10th if you believe he was there and the intent that he may have had and any of the acts in the case.

Finally, after the charge and at the request of defense counsel he repeated that admonition: "I will say something about Mr. Galante's prior conviction. I will repeat what I said originally. It is not a related case, and it does not decide his guilt or innocence in this case, but simply to use it for the limited purpose of his motive." (T. 453).

Moreover, the record shows that the argument of the summation on Galante's prior conviction was both moderate and appropriate. The prosecutor never went beyond the proper argument that the prior conviction bore on the question of Galante's knowledge of the stolen character of the goods and on his motive and intent in visiting Bristol Bargain Fair on April 10, 1975. The prosecution stated in its initial summation (T. 339):

> The Government has introduced into evidence, and you will have an opportunity to have with you in the jury room a copy of the conviction of Mr. Galante which came down in June of 1973, which states:
>
> "That on or about September 1, 1972, defendant——" that is Galante, "knowingly did have in his possession chattels of a value in excess of $100.00, that is fifty cartons of sweaters, and fourteen cartons of headphones, which chattels had been embezzled and stolen while the said chattels were moving as, were part of, and constituted a

> foreign shipment of freight and express from Pusan, Republic of Korea, and Yokahama, Japan to New York, State of New York, the defendant, knowing said chattels to have been stolen."
>
> The conviction was in 1973.
>
> Ask yourselves about that conviction. Think about it when you ask yourselves the fact of whether or not Mr. Galante knew these goods were stolen. What Mr. Galante's motives were. What his purpose of being there on April 10th 1975? Ask yourselves about that conviction in considering those factors.

Again, on rebuttal, the prosecution stated (T. 406):

> Mr. Wales makes the argument that the prior conviction of Mr. Galante doesn't really have any relevance to the case. I submit to you, Ladies and Gentlemen that when you look at the prior conviction ask yourselves doesn't it have something to do with the case in the sense that why is Mr. Galante there on April 10th? I think you can answer that question. Did he go there on the 10th as a decent patron of Mr. Cohen and not trying to manipulate other people and the FBI; or was he going there for reasons which we know? That prior conviction has an awful lot to say.

These arguments were approximated in duration by the summation of Galante's attorney. (T. 388-90).

CONCLUSION

The judgments of conviction should be affirmed.

Dated: September 28, 1976.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 1st day of October, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

H. Elliot Wales, Esq.
122 E. 42nd Street
New York, N.Y. 10017

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
Foley Square, New York, N.Y. 10007

Evelyn Cohen

Sworn to before me this
1st day of October, 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977

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New York,
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Attorney for
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U. S. Courthouse
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Attorney for

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